NO. 36626-6-II

COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
TACOMA

THOMAS TROTZER

Appellant,

vs.

GARY VIG and SHERRIE VIG,
Respondents.

APPELLANTS OPENING BRIEF AND CERTIFICATE OF SERVICE

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I. INTRODUCTION

This is a trespass to timber case involving adjacent neighbors in rural Mason County. The respondent, without a survey, proper dimensions of his property, or any official inquiry, cleared a trail/road with his tractor on appellants land in 2000 and again in 2003.

II. ASSIGNMENTS OF ERROR

A. Leading Questions. Whether the Court erred when it did not allow appellants counsel to ask leading questions of the adverse party.

Issue: Does counsel have a right to ask leading questions of a party opponent?

B. Offer of Judgment. Whether the Court erred when it concluded in Conclusion of Law 12 and 13, that the respondents' Offer of Judgment substantially exceeded the amount of the Court's determination when it did not contain any offer on the quiet title claim.

Issue: Does a CR 8 Offer of Judgment have to cover all claims asserted to be effective under the rule?

C. Statute of Limitations. Whether the Court erred in Conclusions of Law 1 and 3, that 2000 trespass to timber was barred by the Statute of Limitations, and accord and satisfaction

Issue 1: Does equitable tolling of the statute of limitations apply when defendant gives express written assurances that there will be no further action without notice.

Issue 2: Does accord and satisfaction apply when there are express written assurances of future performance.

D. Breach of Contract. Whether the Court erred in Conclusion of Law 2, that the defendant's notarized document and the series of documents admitted into evidence did not constitute a settlement agreement or contract between the parties.

Issue 1: Does a series of writings by parties to a conflict constitute a settlement agreement.

Issue 2: What is the statute of limitations for a contract which contains provisions for future performance.

E. Treble Damages. Whether there was sufficient evidence for the Court to find in Conclusion of Law 5, that the 2003 trespass was done in good faith reliance on the conversation in Walmart and was not willful and that treble damages under RCW 64 are not applicable.

Issue 1: Are treble damages available when a defendant does not have correct dimensions to his property trespasses and cause damages on plaintiff's property a second time?

Issue 2: Are there mitigating circumstances when a defendant loses sight of his perception of the boundary line and causes damages a second time.

F. Boundary Line. Whether there was sufficient evidence to support the Court's Findings 7 and 8, that at the 2002 winter meeting at Walmart, the appellant was aware that the respondents were going to extend the trail and that appellant stated that the fence was the boundary line.

Issue 1: Does a chance meeting at a retail store with no definite conclusions between the party constitute notice?

III. STATEMENT OF THE CASE

This case is about two trespasses onto real property owned by Appellant Thomas Trotzer, hereinafter "Trotzer" by respondents Gary and Sherrie Vig, hereinafter "Vig". The parties own parcels next to each other on Arcadia Road in rural Mason County.

In June of 2000, respondent Gary Vig made a trail with his tractor that has a six (6) foot blade on the Trotzer's property. (RP Vol. IV Page 457 Lines 3 - 14) Vig did this work without a permit or a survey. He thought his property was 270 feet in width (RP Vol. II Page 271 Line 7 - 10). His property is only 264 feet in width. (RP Vol. III Page 308 Lines 2-3). See Trial Exhibit P - 28. When Vig purchased the property he never walked the boundary lines, or had the owner or the realtor show him the boundary lines. Vig did not consult Mason County about any surveys. He testified he relied on ribbons and markers that he believed a surveyor put on the property, but he did not see a surveyor put the ribbons on the property. (RP Vol. II, Page 267 Line 10 - Page 270 Line 17.)

After being confronted by Trotzer, the Vigs drafted a notarized letter which among other things stated that "[i]n the future we will never do any work near the property line without first consulting with you." See Trial

Exhibit P-32.

In the winter of 2002, the parties were both in Walmart shopping. Sherrie Vig approached Trotzer. During the conversation with Trotzer Vig testified that she would like to have another loop in the trail. She did not tell Trotzer that they were going to do work near the property line because there was nothing definite. (RP Vol III., Page 406 Line 19 - Page 412 Line 14.) Gary Vig did not tell Trotzer during the conversation at Walmart nor any time after that he was going to do work near the property line.(RP Vol. II., Page 282 Line 3 - Page 283 Line 23).

In July of 2003, again without permission, or without consulting Trotzer, Vig made another trail with his tractor on the Trotzer property. Vig did not have a permit nor a survey. Vig testified that he was told by Trotzer after he plowed in 2000 that the fence was the property line. (RP Vol. 2 Page 275 Line 10 - Page 276 Line 2).Trotzer testified that he never told Vigs that the fence was the property line. (RP Vol. I Page 22, Lines 13 - 18). Even though Vig testified he was relying on the fence line in 2003 when plowing with his tractor he could not see the fence line the entire time he was plowing because it was too bushy. (RP Vol. 2 Page 286 Lines 12 - 25).

IV. STATEMENT OF PROCEDURE

The case was tried before the Honorable James B. Sawyer, Jr., May 8, 9, 10, 11, and 15, 2007. On June 18, 2007, Judge Sawyer entered Findings of Fact and Conclusions of Law. On September 10, 2007, Judge Sawyer entered Judgment for Damages in the amount of $4,340.00 for damages to timber, $1,000.00 in emotional distress and quieted title as requested by the appellant. Judge Sawyer reduced the judgment by $214.50 for costs incurred by respondents under their CR 68 Offer of Judgment.

V. ARGUMENT

A. The Court erred in not allowing counsel for appellant to ask leading questions in the direct examination of the adverse parties.

ER 611(c) states:

> Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witnesses testimony. Ordinarily leading questions should be permitted on cross examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

When appellant's counsel called respondent Gary Vig to the stand as an adverse witness, the Court refused to allow leading questions. The

Court stated:

> There frankly has been no demonstration that this witness is hostile. Although it is by definition a party opponent, demonstrate that you have a hostile witness and I'll allow you to lead. (RP Vol. I, Page 256, Lines 6-9).

ER 611(c) allows leading questions on direct examination of an adverse party. By refusing to allow leading questions, the Court prejudiced the appellant's prepared direct examination of the adverse parties. The case should be remanded for a new trial.

B. The Court erred when it concluded in Conclusion of Law 12 and 13, that the respondents' Offer of Judgment substantially exceeded the amount of the Court's determination when it did not contain any offer on the quiet title claim.

CR 68 governs the Offer of Judgments. Respondents made an Offer of Judgment (CP Sub No. 110, Page No. 16). The Offer of Judgment contained only a monetary amount. There was no mention in the Offer of Judgment on the quiet title claim to establish the survey line as the legal boundary line between the properties. The respondents allege that they did not dispute the survey line as the property line, however, the Offer of Judgment was silent on the issue. On May 15, 2007 on the last day of trial, respondents attempted to have the fence line established as the

boundary line. (RP Vol. 4, Page 629 Line 10 - Page 631, Line 3). The fence line did not extend the entire length of the properties and curved severely into the Trotzer property. See Trial Exhibit D- 6.

Respondent cannot prevail on the Offer of Judgment if the Judgment entered, as in this case, grants relief in excess of the offer.

C. The Court erred in Conclusions of Law 1, 2 and 3 that the 2000 trespass to timber was barred by the Statute of Limitations, accord and satisfaction and that the defendant's notarized document and the series of documents admitted into evidence did not constitute a settlement agreement or contract between the parties.

(1) The Statute of Limitations.

The Statute of Limitations for trespass to timber is three years. However, the Supreme Court under the doctrine of equitable tolling allows this action to proceed even though a statutory time limit has elapsed. Milay v. Cam, 135 Wn.2d 193, 955 P.2d 791 (1998). Danzer v. Labor &Industries, 104 Wn. App. 307, 16 P.3d 35 (2000).

The predicates for equitable tolling are bad faith, or false assurances by the defendant and the exercise of diligence by the plaintiff. Milay, at 206. The defendants have made false assurances to Trotzer.

In the notarized statement Trial Exhibit P-32 dated June 12, 2000 they state under oath:

" [i]n the future we will never do any work near the property line without first consulting with you."

In July of 2003, Defendant Gary Vig, without consulting Trotzer entered onto the Trotzer property. (RP Vol. II., Page 282 Line 3 - Page 283 Line 23). The Vig assurances turned out to be false.

In addition Danny Bruner, the appellants expert forester testified that on the day he observed the trespass it looked like it had been bulldozed recently because it was still all dirt and the bulldozer was sitting there. (RP Vol. I., Page 113 Line 21 - Page 114 Line 4). The Surveyor Sydney Bechtolt, testified the his field crew described the trail as an ATV trail. (RP Vol. III, Page 340 Lines 3 - 20). This constitutes a continual trespass. The only permissive use granted by Trotzer was for Sherrie Vig to walk the trail. (RP Vol. 2, Page 289, Lines 22- 25).

(2) Accord and Satisfaction.

Accord and Satisfaction can be shown only if the debtor:

(1.) Tenders payment (2) on a disputed claim, (3) communicating that the payment is intended as full satisfaction of the disputed claim, and (4) the creditor accepts the payment. Sorrel v. Eagle Healthcare, Inc., 110 Wn. App. 290, 297, 38 P.3d 1024 (2002).

Trial Exhibits P-31, P32, and D-3 would be the documents that would make up the Accord and Satisfaction. Exhibit P-32, the notarized document by the respondents contains the clause that "[i]n the future we will never do any work without first consulting with you. The accord and satisfaction was not accomplished by these documents.

(3) Settlement Agreement.

In June of 2000, when the respondents trespassed and caused damage on the appellant's property, the parties reached a settlement agreement to avoid litigation.

Settlement agreements are considered to be contracts and their construction is governed by the legal principles applicable to contracts and they are subject to judicial determination in light of the language used and the circumstances surrounding their making. Stottlemyre v. Reed, 36 Wn. App. 169, 665 P.2d 1383 (1983).

The statute of limitations for a written agreement is six years. RCW 4.16.040(1). Despite the settlement agreement the respondents continued to trespass. In July of 2003 the respondents brought out heavy equipment

and cleared the appellants property again. Respondents cleared additional areas in gross violation of the settlement agreement. In response the appellant filed suit for damages and seasonably amended his complaint for breach of the settlement agreement. (See CP Sub No. 79)

D. There was sufficient evidence for the Court to find in Conclusion of Law 5, that the trespasses were done in good faith reliance on the conversation in Walmart and was not willful and that treble damages under RCW 64 are not applicable.

RCW 64.12.030 states:

> Whenever any person shall cut down, girdle or otherwise injure, or carry off any tree, timber or shrub on the land or another person, or on the street or highway in front of any person's house, or public grounds of any village, town or city lot, or cultivated grounds, or on the commons or public grounds of any village, town or city, or on the street or highway in front thereof, without lawful authority, in an action by such person, village, town or city against the person committing such trespasses or any of them, if judgment be given for the plaintiff, it shall be given for treble the amount of damages claimed or assessed therefor, as the case may be.

Trotzer presented evidence at trial through expert Danny Bruner as to the ornamental value of the trees and shrubs torn up by the respondent's tractor with the six (6) foot blade as he cut a road through Trotzer's property. (RP Vol. 1, Page 105 Line 5 - Page 109, Line 4). Those damages totaled $13,910.00. Trotzer lived on the property for

most of his life and intended to keep it in its natural state. (RP Vol. 1, Page 7, Lines 2 - 21).

There are no mitigating circumstances under RCW 64.12.040 as defendants have no probable cause to believe that they were on their own property as they cut a road through Trotzer's property.

In the first trespass by Vig he stepped off 270 feet, when his deed clearly states it is 4 chains in width which would be 264 feet in width. Vig is an active landlord and owns numerous properties and has employed surveyors prior to the trespasses in this case (RP Vol. I., Page 255 Line 15 - Page 259 Line 7). In order to avoid treble damages Vig must prove mitigating circumstances. Mitigating circumstances are defined by RCW 64.12.040 which reads:

RCW 64.12.040 Mitigating circumstances -- Damages.

If upon trial of such action it shall appear that the trespass was casual or involuntary, or that the defendant had probable cause to believe that the land on which such trespass was committed was his own, or that of the person in whose service or by whose direction the act was done, or that such tree or timber was taken from unenclosed woodlands, for the purpose of repairing any public highway or bridge upon the land or adjoining it, judgment shall only be given for single damages.

Vig's testimony on the 2000 trespass was that he never walked the property with the previous owner, or realtor nor checked with the County for surveys. He saw some ribbons that he believed a surveyor had left, but he did not see a surveyor place the ribbons and then he stepped off 270 feet when he only owned 264 feet. (See Trial Exhibit P-28, RP Vol. 4 Page 639, Lines 2 - 9). He had also heard that Mason County surveys were notorious for mistakes. See Trial Exhibit 30. Without further inquiry he then began to make a trail/road with his tractor with the six (6) foot blade.

Vigs's testimony on the 2003 trespass was that he believed the fence was the property line. However, he testified that when he was doing the work on the Trotzer property he could not see the fence the entire time because it was too bushy. (RP Vol. II, Page 286, Line 12 - 25). The fact that Vig continued to plow the road when he could not see what he believed was the property line was reckless, and he did not have probable cause to believe the land was his own eliminating the mitigation provisions of RCW 64.12.040. See Hill v. Cox, 110 Wn. App. 394, 406, 41 P.3d 495 (2002).

When the Trial Court's decision is not supported by the findings

of fact the decision must be overturned. Willener v. Sweeting, 107 Wn.2d 388, 730 P.2d 45 (1986). There is no probable cause for Vig to believe the property that he trespassed on was his own in either 2000 and 2003 and the Trial Court should be reversed and treble damages should be awarded.

E. There was insufficient evidence to support the Court's Findings 7 and 8, that at the 2002 winter meeting at Walmart, the appellant was aware that the respondents were going to extend the trail and that appellant stated that the fence was the boundary line.

In the winter of 2002, the parties were both in Walmart shopping. Sherrie Vig approached Trotzer. During the conversation with Trotzer Vig testified that she would like to have another loop in the trail. She did not tell Trotzer that they were going to do work near the property line because there was nothing definite. (RP Vol III., Page 406 Line 19 - Page 412 Line 14.) Gary Vig did not tell Trotzer during the conversation at Walmart nor any time after that he was going to do work near the property line.(RP Vol. II., Page 282 Line 3 - Page 283 Line 23).

Trotzer testified that he never told Vigs that the fence was the property line. (RP Vol. I Page 22, Lines 13 - 18). Regardless, Vig did not follow the fence line because he could not see it. (RP Vol. II, Page 286, Lines 12-25).

The Findings are unsupported by the record and must be reversed. When the Trial Court's decision is not supported by the findings of fact the decision must be overturned. Willener v. Sweeting, 107 Wn.2d 388, 730 P.2d 45 (1986).

VI. CONCLUSION

The Trial Court should be reversed, and the case remanded to the Superior Court awarding damages for trespasses in 2000 and 2003, and trebling the same. The Court should strike the CR 68 award and award the appellant his costs. Or the Court should remand to the Trial Court reinstating the claim for the 2000 trespass on an equitable tolling basis and allow the appellant to ask leading questions of the adverse party on direct examination.

Dated this 3 day of March, 2008.

LAW OFFICE OF PETER J. NICHOLS, P.S.

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Attorney for Appellant

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on March 3, 2008 via facsimile and First Class mail a true and correct copy of the Appellant's Opening Brief addressed to:

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DATED AT Seattle, Washington on this 3RD day of March, 2008.

Peter J. Nichols